No. 02-1731

Supreme Court, U.S.
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In The
Supreme Court of the United States

SODEXHO MARRIOTT SERVICES, INC.,

Petitioner,

v.

CYNTHIA CARTER MCREYNOLDS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KERRY ALAN SCANLON*
DAVID O. BICKART
STEVEN S. ROSENTHAL
T. MELINDAH BUSH
NICOLE J. BECTON
KAYE SCHOLER LLP
901 15th Street, N.W., Suite 1100
Washington, DC 20005
(202) 682-3500
Attorneys for Respondents

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Should this Court review a decision by the court of appeals denying an interlocutory appeal under Rule 23(f) of the Federal Rules of Civil Procedure, where the decision is one committed to the sole and unfettered discretion of the courts of appeals?

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COUNTER-STATEMENT OF THE CASE[1]

This employment discrimination case challenges a promotion process that used to be common 40 and 50 years ago. Supervisors and senior officials, who are overwhelmingly white, have been given free reign to handpick their selections from lower management ranks without a competitive posting process, without using any predetermined selection criteria and without recording why they selected their favored promotion candidates and rejected or declined to consider disfavored candidates. A leading industrial psychologist described this system as "lax and corruptible," and prone to discrimination against racial minorities. Prien Rep. ¶ 4, Exhibit 11 to Motion for Class Certification, Docket No. 34.[2] No one should be surprised that the company's "good old boy network," as some of its white managers described it, did in fact discriminate against black managers. Hendrickson Dep. at 164, 166, 184, Exhibit 7 to Motion for Class Certification, Docket No. 34. Racism flourished in this system and the company's own human resources personnel, including a corporate vice president, agreed that the supervisors involved in most of the promotion decisions "won't hire [black people]." Petitioner's Appendix (hereinafter "Pet. App.") B at 11a.

The Respondents charge that the Petitioner, Sodexho Marriott Services, Inc. ("Sodexho"), has denied its African-American managers promotions and promotion

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[1] This Counter-Statement of the Case, accompanied by record citations, is submitted in response to Petitioner's Statement of the Case, which is devoid of record citations.

[2] The record citations in this brief are to the district court record and docket numbers because no record on appeal was created.

opportunities, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* and the Civil Rights Act of 1866, 42 U.S.C. § 1981, in the following ways, among others: "(1) positions are filled without being posted at all; (2) when jobs are posted, favored employees are preselected for the positions; and (3) when 'more than one person is actually considered for an opening, hiring managers have virtually total discretion in their promotion decisions because they are not given job-related or objective criteria and are not required to document the reasons for their decisions, making them unreviewable.'" Pet. App. B at 9a-10a. The Complaint further alleges that Sodexho's African-American managers face a "glass wall" as well as a "glass ceiling," because they have been shunted into dead-end "black" accounts that serve and are supervised mostly by African-Americans. *See* Class Complaint at ¶ 24k, 27, Docket No. 1. The Complaint seeks extensive and highly detailed injunctive relief, including requiring Sodexho to adopt and implement a validated promotion selection procedure, including job posting and interview policies and to keep records of its selection criteria and its promotion decisions. *Id.* at 52-54. The Complaint also seeks back pay and compensatory and punitive damages. *Id.* at 54.[3]

[3] The Complaint seeks no particular amount of damages, let alone the $1 billion cited in the Petition, Pet. at 4, which assumes without a shred of record support that every class member would recover $300,000 – the statutory maximum under Title VII. The Petition provides no record support for this assumption, and the only class member testimony relied on by Petitioner in the District Court merely observed that the amount of damages was for a jury to decide. *See, e.g.*, Richardson Dep. at 214-21, Exhibit 98 to Motion for Class Certification, Docket No. 34.

After six months of discovery, the respondents moved to certify the case as a class action on behalf of all adversely impacted African-American salaried employees at Sodexho or its predecessors during the class period who held or sought to hold upper-level managerial or supervisory positions or jobs leading to those positions. *See* Pet. App. B at 10a. Petitioner estimated that 2,600 Sodexho employees are included in the certified class and Respondents do not dispute that the number of class members is roughly in the range of a few thousand.

Under D.C. Circuit law applying this Court's holding in *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982), the class representatives are required to make a "significant showing" that Sodexho's promotion practices operated under a "common policy" of discrimination. *Hartman v. Duffey*, 19 F.3d 1459, 1472 (D.C. Cir. 1994) (citing *Wagner v. Taylor*, 836 F.2d 578, 589 (D.C. Cir. 1987)). Pet. App. B at 27a-28a, 32a. In evaluating whether Respondents made a "significant showing," the district court considered nine volumes of Sodexho documents, depositions, transcripts and expert reports. *Id.* at 3a. The portrait that emerged from this "comprehensive record," *id.*, was of a promotion process that was typical of the early 1960s, which is rife with the risk that managers, exercising unlimited and unreviewable discretion, will continue promoting white employees to higher positions previously occupied by whites and keeping black employees in lower-level positions traditionally held by blacks.

Sodexho's selection procedures do not represent, as Petitioner suggests, merely "decentralized" decisionmaking. Instead, as the district court found, "the testimony of Sodexho's own witness, as well as that of other company employees confirms that Sodexho's policy and practice is to

allow each manager to make promotion decisions based on whatever criteria he or she chooses, with no guidance or rules." *Id.* at 31a-32a. Sodexho's hiring managers have "complete discretion" to decide whom to interview for each position. *Id.* at 9a. They are subject to no rules and are given no guidelines on how to evaluate or rank those promotion candidates that they do interview. *Id.* And they typically keep no notes or other documentation to explain their selection. *Id.* Upon reviewing this system, whose elements Sodexho's own witnesses repeatedly confirmed, one of this country's foremost industrial psychologists testified that in 40 years he had never encountered a company of Sodexho's size with such "lax and corruptible selection criteria and procedures." Motion for Class Certification at 1, Docket No. 34.

The D.C. Circuit has long recognized that promotion systems, like Sodexho's, that are "unchecked," "unvalidated" and "subjective" present a great risk of racial bias when the decisionmakers are predominantly white. *See, e.g., Cook v. Boorstin*, 763 F.2d 1462, 1472 (D.C. Cir. 1989); *Segar v. Civiletti,* 508 F. Supp. 690, 706 (D.D.C. 1981), *aff'd*, 738 F.2d 1249 (D.C. Cir. 1984).[4] However, Respondents did not rely solely on facts that showed a risk of

[4] Sodexho's class certification opposition ignored these controlling precedents. Its petition for certiorari compounds its earlier error by misstating that the district court found a "lack of controlling precedent" on whether subjective selection criteria may represent a common issue of fact or law supporting certification under Fed. R. Civ. P. 23(a). Pet. at 23. The "controlling precedent" which the district court found lacking consisted of *district court* opinions in *other circuits* upon which Sodexho had relied. These opinions were not "controlling" because they involved very different facts. Pet. App. B at 35a.

bias. They presented, and the district court considered, admissions by high-ranking Sodexho managers that their company's promotion system was indeed "corrupt." For example, human resource managers from across the country, who work closely with the promotion system, admitted that "our district managers won't hire black people." Pet. App. B at 11a-12a. Sodexho's top official and corporate representative for equal employment opportunity issues testified that the sparse number of "African-American promotions 'indicated a problem' and 'would be considered low.'" *Id.* at 11a. A senior-level white manager also provided several examples of preselection of white managers for promotions and racist statements by other white upper-level managers, such as "African Americans were genetically inferior to whites, and genetically most of the criminals in the world were African Americans, and that they didn't deserve to have promotions." *Id.* at 12a.

Contrary to Sodexho's unsupported assertions in its petition about its "aggressive pursuit of affirmative action," Pet. at 5, the record also shows, and the district court found, that Sodexho's top managers admitted that they had a problem promoting blacks to upper-level jobs but did nothing to remedy the problem. They tried instead to cover it up. For example, in 1995, company executives "were made aware of the lack of African-Americans" in upper-level jobs by members of the company's own diversity roundtable group, yet they did nothing to address or remedy the problem. Pet. App. B at 12a-13a. In fact, a Sodexho executive refused to permit a class member to

review its workforce diversity data because "the numbers really don't look very good." *Id.* at 13a.[5]

The Respondents buttressed their showing of class-wide discrimination with a statistical analysis of Sodexho's company-wide promotion data by Dr. Bernard Siskin, whose opinions Petitioner *concedes* satisfy Fed. R. Evid. 702, *i.e.*, are "based upon sufficient facts or data," are the "product of reliable principles and methods" and have been applied "reliably to the facts of the case." Pet. at 8 (conceding that Dr. Siskin's report satisfied threshold for admissibility). Dr. Siskin concluded that Sodexho's company-wide promotion process had resulted in statistically significant racial disparities in promotions adverse to African-Americans. *See* Pet. App. B at 15a-16a. After examining over 10,000 promotions from 1995-2001, Dr. Siskin estimated, with a high degree of confidence (statistically significant at more than eight standard deviations, far

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[5] Sodexho also argues, with no record citation whatsoever, that its "employment practices have been reviewed numerous times by the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") and have repeatedly received a clean bill of health." Pet. at 5. However, Sodexho's own corporate witness for equal employment opportunity and affirmative action issues admitted that although the Department of Labor requires annual affirmative action plans for each individual unit with more than 50 employees, of which Sodexho has hundreds, Petitioner has produced only about 20 affirmative action plans ("AAPs"), none of which covered more than a single year. *See* Watkis Dep. v.2 at 181-83, Exhibit 4 to Motion for Class Certification, Docket No. 34. Those AAPs appear to have been created only in response to the handful of audits by the OFCCP for a few individual units. Such threadbare affirmative action compliance is hardly "aggressive," but instead falls short of even the basic affirmative action requirements. Moreover, an OFCCP audit of only a handful of units cannot be construed as a "clean bill of health."

above the 1.96 standard deviations which the D.C. Circuit has accepted) that African-Americans had received far fewer promotions than one would expect in a race-neutral promotion process. *See* Pet. App. B at 15a-16a & n.12; Siskin Rep. at ¶¶ 24, 33, Exhibit 9 to Motion for Class Certification, Docket No. 34; Siskin Supp. Rep. at ¶ 6, Exhibit 50 to Motion for Class Certification, Docket No. 34. The district court recognized that under controlling D.C. Circuit precedent, such a statistically significant disparity, standing alone, is sufficient to establish the presence of a class-wide discriminatory practice. Pet. App. B at 16a n.12 (citing *Anderson v. Zubieta*, 180 F.3d 329, 339-40 (D.C. Cir. 1999)). Dr. Siskin's analysis also supported the plaintiffs' "glass wall" allegation. He found that African-American managers are segregated by race into predominantly "black accounts," with nearly two-thirds of all African-American managers in large accounts concentrated in less than ten percent of those accounts, while two-thirds of those accounts (596 out of 878) have no African-American managers at all. *See id.* at 16a.

The district court declined Petitioner's request to weigh Dr. Siskin's analysis against the competing analysis of the same data offered by its expert. Although the district court ruled that the case law did not support weighing conflicting expert opinions at the class certification stage, *id.* at 13a-14a and n.10, it nevertheless considered Sodexho's criticisms of Dr. Siskin's statistical analysis that have now been recycled in the certiorari petition. First, contrary to Sodexho's contention that Dr. Siskin "failed to assess whether the shortfall [of African-American promotions] was national in scope or was limited to particular divisions, regions, or local operating units," *see* Pet. at 4, the district court recognized that he

had indeed found that these statistically significant racial disparities existed company-wide. *See* Pet. App. B at 17a. Next, the district court rejected Petitioner's criticism, which it raises again in this Court, that Dr. Siskin failed to consider whether disparities in education or work experience explained the racial disparity in promotions. *See* Pet. at 8-9. Because Sodexho had no computerized data on education or work experience that an expert could use, the district court refused to "penalize" respondents for Sodexho's own "lack of centralized controls and record keeping." Pet. App. B at 38a n.25.[6]

The district court also rejected Petitioner's contention that the class representatives were inadequate, because the class potentially included managers who had supervised other class members. *Id.* at 48a-49a. Consistent with other district court decisions in the circuit, the district court read the leading D.C. Circuit decision on intra-class conflicts to require a case-by-case evaluation of the impact of a potential conflict among supervisors on the class member's adequacy, and on the particular facts of *this*

[6] The testimony of its statistical expert, Dr. Haworth, was neither (as described by Sodexho) more "objective" nor "more accurate" (Pet. at 5, 6) than Dr. Siskin's. To take but one example, Dr. Haworth unaccountably assumed the *only* qualified candidates for "open" positions came from those few, other units from which successful candidates had previously been selected. For example, Dr. Haworth's "pool" of two white managers who were, by her assumption, the only ones "available" for a position at American University in Washington, D.C., *included* a white man from North Carolina, who was selected for the job, and *excluded* 31 blacks in the same job category in the Washington, D.C. area, five of whom already worked at American University. *See* Siskin Decl. at ¶ 4, Exhibit 92 to Respondent's Reply Memorandum In Support of Its Motion for Class Certification, Docket No. 47.

case, found the potential for conflict to be minimal. *Id.* at 47a (citing *Wagner v. Taylor*).

Therefore, the district court found that Respondents had "made a 'significant showing' [as required by D.C. Circuit precedent] that Sodexho's lack of any uniform promotion policy or guidelines has had a disparate impact on the promotion of African-American employees, and has enabled or even fostered an environment at the company in which officials intentionally discriminate against blacks by denying them promotions to upper-level managerial positions." *Id.* at 32a. On June 25, 2002, the Court certified, for liability purposes only, a class of African-American managers employed by Sodexho since March 27, 1998. *Id.* at 3a-4a, 53a-54a. Pending a determination on liability, the Court deferred decision on certifying any remedial issues, such as those involving back pay or any other monetary relief. *Id.* at 51a-52a.

On July 10, 2002, Petitioner filed a Rule 23(f) petition for interlocutory appeal, which the court of appeals denied because it did not present "any 'unsettled and fundamental issue[s] of law relating to class actions, important both to the specific litigation and generally, that [are] likely to evade end-of-the-case review.'" Pet. App. A at 1a-2a. Sodexho now seeks review of the court of appeals' discretionary order denying its Rule 23(f) petition.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals' Decision Not to Accept Sodexho's Petition for Interlocutory Review Was Committed to that Court's Discretion and Does Not Warrant This Court's Review

With very limited exceptions, the U.S. courts of appeals have jurisdiction to review only "final" district court orders, and district court orders granting or denying class certification are "interlocutory," not "final." In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), this Court held that class certification orders are not reviewable unless both the district court certifies the order under 28 U.S.C. § 1292(b) and the would-be appellant persuades the court of appeals that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." 437 U.S. at 475 (quoting *Fisons, Ltd. v. United States,* 458 F.2d 1241, 1248 (7th Cir. 1972)). *Coopers & Lybrand* recognizes that section 1292(b)'s screening procedure requires separate, independent discretionary decisions by the district court and the court of appeals. *Id.* at 474-75. Thus, even if the district court exercises its discretionary power to recommend an interlocutory appeal, "[t]he appellate court may deny the appeal for any reason, including docket congestion." *Id.* at 475.

Congress subsequently amended the Rules Enabling Act to authorize this Court to "prescribe rules . . . to provide for an appeal of an interlocutory decision to the Courts of Appeals." Pub. L. No. 102-572, § 101, 106 Stat. 4506 (codified as 28 U.S.C. § 1292(e)). The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States then proposed, and this Court adopted, a new Civil Procedure Rule 23(f), which allows a

court of appeals "in its discretion [to] permit an appeal from an order of a district court granting or denying class action certification. . . . " Fed. R. Civ. P. 23(f). Rule 23(f) was "designed on the model of § 1292(b)," and it built upon § 1292(b) jurisprudence. Proposed Amendments to the Federal Rules of Civil Procedure, 167 F.R.D. 523, 565 (1996). The new rule modified the § 1292(b) standard in two respects, both of which increased the court of appeals' discretion whether to accept an interlocutory appeal from a class certification order: The court of appeals was given discretion to accept an appeal without a district court certification ruling, and the court of appeals' jurisdiction was not limited to orders that involved "a controlling question of law as to which there is a substantial ground for difference of opinion. . . . " Advisory Committee Notes to Rule 23(f). The net effect of these modifications was that Rule 23(f) vested the courts of appeals with broad and standardless discretion as to whether to grant review of class certification orders.

In the four and one-half years since Rule 23(f) went into effect, many courts of appeals have described the criteria they will use to guide themselves in the exercise of their discretion under Rule 23(f). Although relatively few class actions are filed in the D.C. Circuit, last year in *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002), the Court of Appeals for the District of Columbia Circuit described the factors that would influence its discretion to accept an interlocutory appeal from a class certification order. Like every other court before it the D.C. Circuit announced that it would exercise its discretion flexibly, mindful of the considerations that underlie the rule, and the Advisory Committee Notes. "In our view," the court wrote, "interlocutory appellate review

under Rule 23(f) is properly directed by the guidance set forth in the advisory committee's note." *Id.* at 104. Nonetheless, agreeing with every other circuit court, the D.C. Circuit retained ample discretion to accept review "in special circumstances that neither the advisory committee's note nor the courts foresaw." *Id.* at 105.

Exercising its discretion in light of Rule 23(f)'s background and language, the Advisory Committee Notes, and its own recent writings, the D.C. Circuit chose not to review the district court's interlocutory order in this case. Given the broad and standardless discretion granted the courts of appeals by Rule 23(f), there is nothing in the D.C. Circuit's ruling that justifies this Court's review.

B. The Language, History and Advisory Committee Notes of Rule 23(f) Support the Conclusion that the Decision Whether to Grant Interlocutory Review is Committed to the Sole, Unfettered Discretion of the Courts of Appeals

Under congressionally-delegated authority, this Court has provided that a court of appeals may "in its discretion" permit an appeal from a district court's interlocutory order granting or denying class action certification. Fed. R. Civ. P. 23(f). By committing class certification review to the "discretion" of the courts of appeals, the rule provides no standard under which this Court, through the exercise of its own discretionary certiorari jurisdiction, can second-guess how the courts of appeals exercise that discretion. Furthermore, as discussed above, Rule 23(f) was created to enhance the discretion that the courts of appeals had exercised under § 1292(b), which (where the district court has certified an interlocutory order for appeal) authorizes

the appellate court to "deny the appeal for any reason. . . . " *Coopers & Lybrand*, 437 U.S. at 475.

The Advisory Committee Notes "provide a reliable source of insight into the meaning of a rule, especially when, as here, the rule was enacted precisely as the Advisory Committee proposed." *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002). The Advisory Committee Notes to Rule 23(f) describe the appellate court's decision to accept an appeal as "unfettered" and subject to that court's "sole discretion" based on "any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23(f) Advisory Committee Notes. The exercise of discretionary jurisdiction would not be "unfettered" if this Court were to second-guess how the appellate court exercised its discretion, applying a legal standard of this Court's making.

Moreover, in committing the decision whether to entertain interlocutory review to the "sole discretion" of the courts of appeals, Rule 23(f) was intended to allow a court of appeals to grant or deny review based upon the overall status of its docket, a factor which this Court is in no position to reassess. It is, thus, entirely understandable why the Advisory Committee Notes liken the discretion of a court of appeals under Rule 23(f) to "the discretion of the Supreme Court acting on a petition for certiorari." At its essence, the decision whether to grant a writ of certiorari is a highly individualistic determination as to whether the demands of this Court's docket and the need for clarifying the law make it desirable to review "a particular case at a particular time." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950). Rule 23(f), likewise, expressly granted the courts of appeals "unfettered" discretion to

grant review based upon the desirability of reviewing a particular case at a particular point in time.

Because it would undermine the unfettered discretion that Rule 23(f) has given to the federal appellate courts to determine whether to accept an appeal thereunder, Sodexho's petition for a writ of certiorari to review the appellate court's Rule 23(f) denial should be denied.

C. There is No Circuit Conflict on Rule 23(f) Standards

Rule 23(f) contemplates that the circuit courts will evaluate each petition for interlocutory review on a case-by-case basis, without being confined to any hard-and-fast rules. In analogizing discretionary review under the new rule to this Court's certiorari jurisdiction, the Advisory Committee knew that "different reasons not infrequently move different members of the Court in concluding that a particular case at a particular time makes review undesirable." *Baltimore Radio Show,* 338 U.S. at 918; *see also Teague v. Lane*, 489 U.S. 288, 296 (1989) (noting variety of considerations behind certiorari denial). It is therefore not necessary or even desirable for each panel of each circuit to employ an identical standard in choosing whether to accept a petition for interlocutory review. Indeed, some circuits have not announced the criteria they would employ in acting on petitions for review, and there is

nothing in the rule that requires them to do so.[7] The rule-making process that culminated in Rule 23(f) concluded that each appellate court should have free reign to pass on interlocutory review petitions as that court sees fit, and that decision is entitled to "full respect." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 48 (1995). It is unnecessary and undesirable for this Court to grant certiorari to impose any single review standard on the courts of appeals.

In any event, there is no circuit conflict. Consistent with the Advisory Committee Notes, and beginning with *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999), every circuit that has spoken to the issue has declined to adopt a "bright-line approach," or to issue a definitive "catalog of factors." *Id.* at 834. Last year, after surveying the decisions of the seven circuits (including the D.C. Circuit) that had already written on the issue, the Court of Appeals for the Sixth Circuit found that they all sounded the same theme: they "eschew any hard-and-fast test in favor of a broad discretion to evaluate relevant factors that weigh in favor of or against an interlocutory appeal." *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2252 (2003). The D.C. Circuit's *Lorazepam* opinion falls squarely within the consensus view of every circuit: "Interlocutory appellate review under Rule 23(f) is properly directed by the guidance set forth in the advisory committee's note," and any

[7] Federal Appellate Rules 5(c) and 32(c) treat petitions for interlocutory review as "other papers," just like petitions for rehearing, which are commonly determined by order, without any explanation.

further written guidance on the subject should be understood as "guidance, not a rigid test." 289 F.3d at 104, 105.

The D.C. Circuit's "further written guidance" as to when interlocutory review is appropriate is also consistent with that of other circuits. Sodexho inaccurately portrays the D.C. Circuit as having adopted a "death knell" rule for class certification orders, because the court has emphasized that end-of-the case review remains available for run-of-the mill challenges. Pet. at 12-13. But almost every circuit has said much the same thing. For example the Third Circuit, whose standards are said to present an "irreconcilable" conflict with the D.C. Circuit, has observed that "interlocutory review will generally prove unnecessary" if "allowing the litigation to follow its natural course would provide the moving party with an adequate remedy." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164-65 (3d Cir. 2001). The Eleventh Circuit has similarly cautioned against interlocutory review of class certification orders absent "a compelling need for resolution of the legal issue sooner, rather than later." *Prado-Steinman ex rel. Prado v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000). The Seventh Circuit has agreed. In accepting review in *Blair v. Equifax*, the court of appeals emphasized that the certification order was likely to "evade review at the end of the case," because the pending action was one of multiple suits pending in various jurisdictions. 181 F.3d at 838.

Nor have the courts of appeals perceived any conflict among themselves. In *Newton v. Merrill Lynch*, the Third Circuit drew on the "thoughtful opinions of four other circuits, including the First Circuit." 259 F.3d at 163 n.3, 164 n.5. If there is anything in the First Circuit's guidance that is "highly restrictive" (Pet. at 14 n.9), it has escaped

the notice of many federal appellate judges.[8] Likewise, although the Petition seeks to portray the D.C. Circuit as unusually hostile to interlocutory review, the Sixth Circuit has read the D.C. Circuit's warning that interlocutory review is the exception, rather than the rule, as consistent with "the other courts before it." *In re Delta Air Lines,* 310 F.3d at 959. In fact far from having adopted a standard that is more restrictive than other circuits, the D.C. Circuit regards its criteria as being more flexible and less hostile to interlocutory review than that of the Seventh Circuit, the Petitioner's paragon of liberality. In *Lorazepam,* the D.C. Circuit observed that, where the district's order did not sound the "death knell" for the litigation, the Seventh Circuit would ignore entirely the likelihood that the district court's order was simply wrong. 289 F.3d at 105. In contrast the D.C. Circuit will not ignore district court error, at least where such error is "manifest." *Id.*[9]

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[8] Sodexho deals with this incongruity only by accusing the First Circuit of dissimulation: "Thus the First Circuit has adopted a highly restrictive standard closer to that of the D.C. Circuit, even though it professes affinity with the Seventh Circuit." Pet. at 18 n.9. And in Sodexho's warped world, the Second Circuit's guidance is "significantly more liberal" than the D.C. Circuit's, *id.* at 15 n.7 (citing *In re Visa-Check/Master Money Antitrust Litig,* 280 F.3d at 124, 132 n.2 (2d Cir. 2001), in which review was granted), but, nevertheless, is calculated to "shut the door on Rule 23(f) appeals." Pet. at 15 (citing *In re Sumitomo Copper Litig.,* 262 F.3d 134, 140 (2d Cir. 2001)).

[9] Contrary to Sodexho's claim (Pet. at 12), it is not at all certain that mandamus is available to correct erroneous certification orders. Indeed, Rule 23(f) was adopted in part because courts and scholars were "uneas[y]" that the use of mandamus to reverse class certification orders may have unduly "stretched the writ's traditionally restrictive parameters." *Newton v. Merrill Lynch,* 259 F.3d at 163.

In its attempt to manufacture a circuit conflict, Sodexho misuses statistics, as well as words. It is neither surprising nor significant that the Seventh Circuit has heard quite a few Rule 23(f) appeals, while the D.C. Circuit has not heard any. Only a handful of Rule 23(f) petitions have reached the D.C. Circuit, in contrast to the multitude of petitions in the Seventh Circuit and many other circuits. The disparity in petitions reflects the twenty-fold difference between the very few class actions of any sort that are pending in the D.C. Circuit (23) and the large number that are pending in the Seventh Circuit (453). Administrative Office of U.S. Courts, "Judicial Business of the United States Courts 2002," Table X-4, available at http://www.uscourts.gov/judbususc/judbus.html.[10] It should not take a statistician to recognize that meaningful comparisons between the circuits cannot be drawn from raw numbers of petition grants.

D. The Committee on Rules of Practice and Procedure Has Identified No Problems with Rule 23(f) that Require Fixing at This Time; Any Efforts to Circumscribe the Courts of Appeals' Discretion As to Whether to Review Class Certification Orders Should be Left to the Committee or to Congress

Sodexho's reliance on pending legislation to support its view that "de minimis review" under Rule 23(f) is

[10] According to the latest Administrative Office Report, as of September 30, 2002, only 0.5 percent of the 4,835 class actions pending in the federal courts were filed in the District of Columbia, and only three of these were civil rights employment cases. *Id.*

"unfair" (Pet. at 27), merely confirms that adjustment of the standards for interlocutory review is best left to Congress. After Sodexho filed the Petition, the House of Representatives approved H.R. 1115, sections 6 and 8 of which make any class certification order that is entered after this proposed law's enactment appealable as of right. If courts acting under the five-year-old legal regime of Rule 23(f) do not exercise their discretion sufficiently frequently, Congress can easily strip appellate courts of their discretion entirely, as H.R. 1115 would do, although even the House bill would not affect pending cases, like this one. Other than to change the result in this case, there is no reason for this Court to exercise its certiorari authority to craft a new standard to govern interlocutory review of class action orders.

Furthermore, this Court should consider that the Committee on Rules of Practice and Procedure of the Judicial Conference has opposed H.R. 1115. In a letter to the Chair of the House Committee on the Judiciary, Judge Scirica,[11] writing for the Rules Committee, reminded the House Committee that interlocutory appeals have generally been "disfavored because they cause unwarranted, expensive, and wasteful interruption;" that the Rules Committee was "unaware of any dissatisfaction expressed by the bench and bar with . . . Rule [23(f)];" and that "any consideration of amending it should be deferred until the bench and bar have had more experience with it." Letter from Judge Anthony J. Scirica to Honorable F. James

[11] Judge Scirica wrote *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001).

Sensenbrenner, Jr., *reprinted in* H.R. Rep. No. 108-144 at 127, 128 (2003) (Appendix A).

E. Even if the District Court's Partial Certification Order Presented Unsettled Issues of Class Action Law for D.C. Circuit Review, That Fact Provides No Reason for This Court to Review This Case

Sodexho dedicates a significant portion of its petition to an attempt to convince this Court that the district court's decision presents "fundamental, unsettled issues of class action law" worthy of D.C. Circuit review. Even if Sodexho's premise were correct, that premise would not justify certiorari review in this case. Each of the questions that Sodexho maintains is "unsettled" has been recently presented in petitions for certiorari to this Court, and this Court has not found any of them worthy of review. Sodexho posits a "conflict" between the Second Circuit and the Seventh Circuit (among others) on how closely courts should scrutinize conflicting expert opinions at the class certification stage. Pet. at 20-22. But this Court has recently denied certiorari to review these supposedly conflicting authorities. *Szabo v. Bridgeport Machs., Inc.*, 534 U.S. 951 (2001), *denying cert.*, 249 F.3d 672 (7th Cir. 2001); *Visa U.S.A., Inc. v. Walmart Stores, Inc.*, 536 U.S. 917 (2002), *denying cert.*, 280 F.2d 124 (2d Cir. 2001); *Metro-North Commuter R.R. Co. v. Norris*, 529 U.S. 1107 (2000), *denying cert.*, 191 F.3d 283 (2d Cir. 1999). *See also Northwest Airlines, Inc. v. Chase*, No. 02-1447 (June 6, 2003), *denying cert.*, 310 F.3d 953 (6th Cir. 2002). Likewise, although Sodexho claims a circuit split on when a class may be certified for liability purposes only (Pet. at 26), this Court did not find it necessary to resolve that

supposed "conflict" last year. *Metro-North Commuter R.R. Co. v. Robinson*, 535 U.S. 951 (2002), *denying cert.*, 267 F.3d 147 (2d Cir. 2001).[12] If these issues are "unsettled" – and we do not believe that they are unsettled – this Court has had and will continue to have ample opportunity to resolve them in cases which present these issues. This Court clearly has no need to follow the "roundabout" practice of compelling the D.C. Circuit to exercise its discretionary jurisdiction merely to set the stage for *possible* consideration by this Court of issues that *may possibly* be decided by the D.C. Circuit. The possible existence of unsettled issues of class action law that might justify D.C. Circuit review in no way supports this Court's grant of a Writ of Certiorari.

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[12] Even Sodexho does not claim a circuit conflict on its third "unsettled" issue – whether the existence of "decentralized" and "subjective" decisionmaking can constitute a discriminatory "policy." (Pet. at 23-26). It cites numerous *district* court decisions that it claims favor its view, but no appellate decision. And as noted in the text, this Court has recently denied certiorari in the *Caridad* case, which Sodexho describes as similar to its case. In our view, the district court's evaluation of all the case law as turning on the application of widely different factual patterns, rather than any fundamental doctrinal disagreement, is a fairer reading, and one that argues strongly against any discretionary review, either by an appellate court under Rule 23(f), or by this Court.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

KERRY ALAN SCANLON*
DAVID O. BICKART
STEVEN S. ROSENTHAL
T. MELINDAH BUSH
NICOLE J. BECTON
KAYE SCHOLER LLP
901 15th Street, N.W., Suite 1100
Washington, DC 20005
(202) 682-3500

Attorneys for Respondents

* *Counsel of Record*

APPENDIX A

COMMITTEE ON RULES OR PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES WASHINGTON, D.C. 20544

[Names Omitted In Printing]

May 12, 2003

Honorable F. James Sensenbrenner, Jr.
Chair
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Chairman Sensenbrenner:

On March 26, 2003, the Director of the Administrative Office of the United States Courts, Leonidas Ralph Mecham, advised you of the March 18, 2003, Judicial Conference resolution recognizing "that the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts, while continuing to oppose class action legislation that contains jurisdictional provisions that are similar to those in the bills introduced in the 106th and 107th Congresses." I am writing you about two specific provisions of the "Class Action Fairness Act of 2003" (H.R. 1115), which are not affected by the Judicial Conference resolution but which directly affect Rule 23 of the Federal Rules of Civil Procedure and are inconsistent with the Rules Enabling Act rulemaking process. (28 U.S.C. §§ 2072-2077.)

The first provision requires courts of appeals to rule on all interlocutory appeals of class-action certification decisions. It directly conflicts with Rule 23(f). The second provision imposes extensive plain-English requirements on settlement notice. It overlaps with amendments to Rule 23(c)(2)(B) approved by the Supreme Court that are presently before the Congress and will take effect on December 1, 2003, unless Congress acts otherwise. We respectfully request your committee to withdraw both provisions from H.R. 1115.

Party Entitled to Interlocutory Appeal of Class-Action Certification Decision

Section 6 of H.R. 1115 amends 28 U.S.C. § 1292(a) and would provide a party the right to an interlocutory appeal of a court's decision granting or denying class-action certification, if an appeal notice is filed within 10 days. The provision also stays all discovery and other proceedings during the pendency of the appeal.

Rule 23(f) was added by the Supreme Court in 1998. It provides courts of appeals with discretion to permit an appeal from an order granting or denying class-action certification. This provision also gives the district court and court of appeals discretion to stay proceedings in the district court pending outcome of the appeal.

Rule 23(f) was promulgated as a result of an exhaustive study of class-action practices by the Advisory Committee on Civil Rules. In its study of Rule 23, the committee considered hundreds of public comments, empirical studies, discussions at several major conferences of practitioners and judges well experienced in class actions, and statements given at public hearings at which

witnesses from major corporations, law firms, and law schools testified. The final Rule 23(f) was reviewed and approved by the Advisory Committee on Civil Rules, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, and Supreme Court of the United States before it was transmitted to the United States Congress in accordance with the Rules Enabling Act.

Rule 23(f) made the necessary changes to reduce unwarranted procedural obstacles in obtaining appellate review of a district court's class-action certification decision. At the same time, however, it addressed concerns expressed by many judges and lawyers that interlocutory appeals are often unnecessary and would be abused as a procedural tactic to delay proceedings and unfairly increase litigation expense in many class actions. These concerns would be heightened by an automatic-stay provision, which could disrupt the district court's ability to manage the case. Providing an appeal as of right might tempt a party to file an interlocutory appeal solely for tactical reasons. Staying discovery and other proceedings in the district court would only increase the tactical advantages of filing an interlocutory appeal, particularly because resolution of the appeal may not occur for 12 to 18 months.

Interlocutory appeals in general have been traditionally disfavored because they can cause unwarranted, expensive, and wasteful interruptions. Rule 23(f) vests discretion in the appellate judges to permit interlocutory appeal of class-action certifications in appropriate cases and gives both the district court and the appellate court discretion to decide whether to stay proceedings pending

appeal. It has been working well, as evidenced by a significant and growing body of appellate law. The courts of appeals have announced detailed criteria to guide practitioners in deciding whether to seek leave to appeal. And the decisions that have granted leave to appeal are developing much-needed guidance on class action certification. The rules committees are unaware of any dissatisfaction expressed by the bench and bar with the rule. Moreover, the rule was only recently promulgated. Any consideration of amending it should be deferred until the bench and bar have had more experience with it.

Plain-English Settlement Notice Requirement

Section 3 of H.R. 1115 adds a new § 1715 to title 28, United States Code, prescribing detailed requirements governing the contents of proposed class-action settlement notices. On March 27, 2003, the Supreme Court transmitted to Congress amendments to Rule 23, which take effect on December 1, 2003, unless Congress acts otherwise. The amendments prescribe the contents of class-certification notices and also require that the court direct notice of a proposed settlement in a reasonable manner to all class members. The matters addressed by these amendments overlap to a certain extent with § 1715. We also believe that in its present form § 1715 may undermine the bill's stated objectives by requiring notices so elaborate that most class members will not even attempt to read them. Moreover, if H.R. 1115 is enacted without revision before December 1, 2003, reconciling any differences between the bill's notice provisions and the notice provisions in Rule 23 that are due to take effect in December 2003 may generate unnecessary confusion and litigation.

In the course of our Rule 23 study, we examined proposals that would have required extensive notices, but found that requiring detailed information in a class notice would be counterproductive, resulting in more complicated and unclear notices. It would defeat the goal of providing clearer and simpler information to putative class members. H.R. 1115's settlement-notice requirements are detailed and would likely encounter the same types of problems. Moreover, H.R. 1115's provisions are directed primarily at settlement notices, while the Rule 23 amendments address not only settlement notices but also the class-certification notice in which putative class members are first notified of the action and, when appropriate, given an opportunity to exercise their right to opt out of the class. The interface between Rule 23 and § 1715 is complicated by the growing number of "prepackaged" class actions that combine the first notice of class certification, including the opportunity to opt out, with notice of proposed settlement provisions.

At our request, the Federal Judicial Center worked with expert communications and linguistics consultants to develop sample plain-English class-action certification and settlement notices in products liability and securities cases. These notices are available on the Center's web site at <http://www.fjc.gov>. The illustrative forms were subjected to consumer testing by representative focus groups. The forms were well publicized and appeared in Law Week and BNA's Class Action Reporter. The Center's sample notices together with the Rule 23 amendments represent the culmination of many years of intensive study and work addressing the problems raised by unclear class-action notices. It is our belief that these models will significantly improve class-action notices.

At the same time, the rules committees do not consider that their class-action work has ended with the Rule 23 amendments. They will continue to monitor the status of class-action practice, including the use of class-action notices.

We recommend that section 6 and new § 1715 as added by H.R. 1115 be withdrawn. Thank you for considering our request.

Sincerely,

/s/ A. Scirica
Anthony J. Scirica
United States Court of Appeals

cc: Honorable John Conyers, Jr., Ranking Democrat
Members of the House Judiciary Committee
Honorable David F. Levi, Chair, Advisory Committee on Civil Rules